NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION
The Voice of Rural Telecommunications
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March 12, 2012

Ex Parte **Notice**

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Connect America Fund**, WC Docket No. 10-90; *A National Broadband Plan for Our Future*, GN Docket No. 09-51; *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135; *High-Cost Universal Service Support*, WC Docket No. 05-337; *Developing an Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45; *Lifeline and Link-Up*, WC Docket No. 03-109; *Universal Service Reform – Mobility Fund*, WT Docket No. 10-208**

Dear Ms. Dortch:

On Thursday, March 8, 2012, the undersigned, on behalf of the National Telecommunications Cooperative Association ("NTCA"), together with Stuart Polikoff of the Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO"), Gerry Duffy and Derrick Owens on behalf of the Western Telecommunications Alliance ("WTA"), Jeff Dupree, Rick Askoff, and Steve Quinnan of the National Exchange Carrier Association ("NECA"), Robert DeBroux of TDS Telecom, Paul Cooper of Fred Williamson Associates, and Larry Thompson of Vantage Point Solutions (collectively, the "Rural Representatives") met with Dan Ball, Amy Bender, James Eisner, Patrick Halley, Trent Harkrader, Paul Hartman, Katie King, Alex Minard, Steve Rosenberg, Craig Stroup, and Rodger Woock of the Wireline Competition Bureau (the "Bureau"). Messrs. Askoff, Quinnan, DeBroux, and Thompson participated via telephone. The Rural Representatives raised the following issues relating to further Universal Service Fund ("USF") reform and implementation of those reforms already adopted in the Order released on November 18, 2011 by the Federal Communications Commission (the "Commission") in the above-referenced proceedings.

Regression Analysis Caps. The Rural Representatives highlighted the exhaustive presentations that they and other commenters have submitted to the Commission identifying problems with its proposed regression analysis-based approach to developing and implementing constraints on USF-supported capital investment and operating expenses. *See*, *e.g.*, Comments of NTCA, *et al.*, (filed Jan. 18, 2011), at 63-75 and Appendices D and E; Reply Comments of NTCA, *et al.*, (filed

Feb. 18, 2011), at 24-28 and Appendix B; Comments of the Nebraska Rural Independent Companies (filed Jan. 18, 2011), at 9-50; Comments of the Rural Broadband Alliance (filed Feb. 17, 2011), at 2-23. Indeed, even the "father" of the Commission's preferred quantile regression analysis has provided a report indicating that the proposed methodology lacks statistical discipline and introduces substantial arbitrariness to the potential caps. Comments of NTCA, *et al.*, (filed Jan. 18, 2011), at Appendix E. By contrast, there is little, if any, statistical evidence or analysis in the record in support of the specific methodology proposed by the Commission.

Given the overwhelming record against the use of such caps, the Rural Representatives urged the Commission and the Bureau to cease review of a regression analysis-based approach and instead consider alternatives that are far better developed and for which there is much stronger evidentiary support on the record. Specifically, the Commission should consider the alternative submitted by the Rural Representatives last year, which would limit investment based upon a schedule tied to replacement of depreciated plant. *See, e.g.*, Comments of NTCA, *et al*. (filed April 18, 2011), at Appendix A. This proposal, as explained at length previously, would place reasonable, locally tailored controls on the growth of USF that take into account "conditions on the ground" across the wide variety of areas served by rural rate-of-return regulated incumbent local exchange carriers ("RLECs") nationwide. In addition to its effectiveness, this proposal would be far simpler to implement than the regression analysis-based caps, which appear highly unlikely, if not impossible, to implement by July 1, 2012 on the basis of the current record.

In the alternative, if the Commission and the Bureau will not reject regression analysis-based caps at this time, they need at a minimum to publish a revised proposal for such caps in light of the current record and then provide reasonable opportunity for further comment ***prior to*** adoption and implementation. It would defy basic notions of procedural fairness and fundamental tenets of administrative procedure to adopt modified caps within the next several months without giving interested parties a reasonable opportunity to examine and comment upon such revised proposals.

Indeed, the Rural Representatives noted that many RLECs have been placed in an extremely difficult position, facing the likely prospect of needing to file for waivers from such caps but feeling unable to do so because no party yet knows what the final caps will look like – or whether regression analysis works at all as presently proposed. This uncertainty has led to substantial concern among carriers who have very good reason to expect substantial reductions in support but do not know yet precisely what waiver needs they may have. It has also discouraged investors and lenders, and has all but frozen broadband investment in early 2012 – contrary to the very purpose of the National Broadband Plan and the Commission's reforms. The Commission should therefore clarify immediately that it will not race ahead to implement regression analysis-based caps that lack evidentiary support and without proper development of a further record. The Commission should instead look to the proposal submitted last year by the Rural Representatives as the only proposal sufficiently developed on the record to justify adoption and implementation.

<u>A Connect America Fund for RLECs.</u> The Rural Representatives noted that the Order contains no specific enhancements for broadband-focused funding for RLECs, and that it instead consists entirely (from a USF perspective) of cuts, caps, and constraints to existing high-cost mechanisms. With such an approach, it will be difficult – and in many cases, impossible – for RLECs to deploy broadband at 4/1 Mbps speeds or higher, and as noted above, some RLECs face the likely prospect of needing to file for waivers once the rules are finalized just to remain in business and provide basic levels of broadband to rural consumers and businesses.

The Rural Representatives therefore emphasized the importance of a true "Connect America Fund" (or "CAF") for RLECs. Detailed rules to implement such a plan have been on the record now for nearly six months, and this "RLEC Plan" would enable reasonable broadband deployment in rural areas while helping to ensure that USF growth would remain at historical, very modest levels (approximately 3% annually). Moreover, the RLEC Plan would solve two of the most vexing issues with respect to rural broadband deployment: (1) the need to ensure that consumers can migrate to standalone broadband services without being compelled to take legacy voice service as well; and (2) the need for middle mile support that will enable RLECs to provide reasonably comparable services at reasonably comparable rates. The Rural Representatives urged the Commission to adopt the RLEC Plan as the CAF for rate-of-return carriers or, at a minimum, to ensure that provisions are in place to support middle mile networks and standalone broadband, particularly since such measures appear likely to be a part of any CAF mechanism in areas served by price cap carriers.

<u>Reporting Concerns.</u> The Rural Representatives next addressed concerns identified in the record with respect to submission of audit reports and other competitively sensitive financial information. *See, e.g.*, Petition for Reconsideration of OPASTCO, WTA, and NECA (filed Dec. 29, 2011), at 23-25; *Ex Parte* Letter of Todd Thorson, Kiesling Associates LLP (filed Feb. 2, 2012). Specifically, they urged the Commission to permit *<u>all</u>* RLECs – and not just Rural Utilities Service ("RUS") borrowers – to utilize a form akin to RUS Form 479 for purposes of providing financial information to the Commission. They also encouraged the Commission to: (1) provide for a reasonable date for the filing of such forms, given concerns about attempting to file such reports in the midst of busy audit seasons; and (2) avoid requiring that any audits be conducted on a study area-specific basis, as such requirements generate substantial additional costs and are in fact much more onerous than those imposed upon larger carriers who are individually likely to receive far greater amounts of USF/CAF support. Finally, the Rural Representatives argued that requiring such financial information to be placed into the public record was wholly inappropriate and contrary to standard Commission and federal agency practice. Instead, the Rural Representatives noted that vehicles such as the Freedom of Information Act and/or Commission protective orders could allow interested parties to review the relevant information without enabling existing or potential competitors to gain access to the data for ulterior purposes.

Unsubsidized Competition. The Rural Representatives noted the robust but reasonable process that they had put forward for determination of whether "unsubsidized competition" exists in a given area, building upon proposals made by others (including the National Cable & Telecommunications Association) previously. *See* Comments of NTCA, *et al*., (filed Jan. 18, 2011), at 75-91 (citing Petition for Rulemaking by National Cable & Telecommunications Association, RM-11584 (filed Nov. 5, 2009), at 12). The Rural Representatives also observed that, while the National Broadband Map (the "NBM") could be a tool in this process, it was clearly informational and could not be considered dispositive in identifying the precise presence of "unsubsidized competition" due to lingering flaws and the fact that it does nothing to identify where *subsidy* may or may not exist with respect to a given area. *See, e.g.*, Comments of NTCA, *et al*., (filed Jan. 18, 2011), at 75-80; *Ex Parte* Letter of ITTA, *et al*. to Marlene H. Dortch, Secretary, FCC, (filed March 6, 2012); *Ex Parte* Letter from Jeffrey S. Lanning, Assistant Vice President, CenturyLink, to Marlene H. Dortch, Secretary, FCC, (filed Jan. 27, 2012), at presentation pp. 4-17. The Rural Representatives suggested that the States are best equipped to administer this process given their proximity to the serving areas, deep understanding of universal service needs there, and access to more current data than reflected on the NBM. The Rural Representatives further urged the Commission to establish and test such a reasonable process *first* before applying reductions in USF support to any serving areas, regardless of the level of purported "competitive overlap" as shown on the NBM. Finally, the Rural Representatives argued that the Commission should apply any reductions to USF support arising out of a finding of "unsubsidized competition" on a prospective basis only, using subaccounts to isolate those expenditures made after such a finding.

Rate of Return Represcription. Much as with the proposed regression analysis approach to developing new caps on supported capital and operating costs, the Rural Representatives highlighted the lack of support on the record for any reduction to the current authorized interstate rate of return and the clear indication to the contrary that risk for RLECs is only increasing as a result of regulatory and business changes. *See, e.g.*, Comments of NTCA, *et al*., (filed Jan. 18, 2011), at 47-63 and Appendices B and C. The Rural Representatives also emphasized that the Commission has not yet established clear rules governing rate of return represcription methods, and has not provided adequate opportunity for evidentiary submissions. The Rural Representatives therefore urged the Commission to cease with further examination of represcription and, if desired, to indicate the intent to re-examine such issues only after "the dust had settled" on the impacts of the reforms already adopted in the Order.

***Waiver Mechanism*.** Finally, the Rural Representatives raised concerns about the waiver process outlined in the Order. As an initial matter, as noted earlier herein, the Rural Representatives observed that the cumbersome nature of the process spelled out in the Order, together with the uncertainty surrounding when the rules (and resulting reductions in support) would be final, was deterring many RLECs from filing for waivers at this time notwithstanding substantial concerns about the apparent cuts arising out of the Order. Moreover, the Rural Representatives noted that the list of information set forth in the Order to justify a waiver appeared to go well beyond what was needed to evaluate the impacts of USF support reductions on an individual carrier.

The Rural Representatives indicated that the waiver should be streamlined to become more of a mechanism and less of a process, and committed to work with the Bureau and the Commission to achieve such an objective.

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Pursuant to Section 1.1206 of the Commission's rules, a copy of this letter is being filed via ECFS with your office. If you have any questions, please do not hesitate to contact me at (703) 351-2016 or mromano@ntca.org.

Sincerely,

/s/ Michael R. Romano
Michael R. Romano
Senior Vice President - Policy

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